

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FLOYD D. BENION,

Defendant-Appellant.

UNPUBLISHED

June 21, 1996

No. 185895

LC No. 94-10895

Before: O’Connell, P.J., and Sawyer and G.R. Corsiglia,* JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of larceny from the person, MCL 750.357; MSA 28.589, and assault and battery, MCL 750.81; MSA 28.276. Defendant was sentenced to eighty months to ten years’ imprisonment for larceny to be served concurrently with a three-month term for his assault conviction. Defendant was given credit for fourteen days served. We affirm.

Francois Herard, a fifteen-year-old University of Detroit High School student, was assaulted and robbed as he waited for a bus at the corner of Puritan and Wyoming in the City of Detroit. A group of boys approached Herard but retreated when one of them indicated that he knew Herard. Two of the boys nevertheless returned, and one of them struck Herard in the jaw and then stole his ring. When Herard fell to the ground, all of the boys joined in the attack and hit, kicked and beat Herard with a board until they were chased off by Willie Miller, the owner of a nearby gas station.

Defendant contends that there was insufficient evidence to convict him of larceny because the prosecutor failed to establish that defendant was the person who stole Herard’s ring. We disagree. Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could find the elements of the crime of larceny from the person to be proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, modified 441 Mich 1201 (1992). Herard testified that the heavy set boy who first hit him was the person who stole his ring, and Miller identified defendant as

* Circuit judge, sitting on the Court of Appeals by assignment.

the person who first hit Herard. Questions regarding the credibility of these witnesses were properly resolved by the trier of fact. *People v Premen*, 210 Mich App 211, 221; 532 NW2d 872 (1995).

Defendant's remaining issues relate to his sentencing. First, defendant argues that the trial court erred in assessing fifty points under offense variable two. We disagree. A score of fifty points is proper when the victim was treated with "excessive brutality." Michigan Sentencing Guidelines, p 99 (2d ed 1988). Upon review of the record, we find that evidence exists to support the trial court's determination that defendant treated Herard with excessive brutality, and, therefore, it did not err in assessing fifty points under the variable. *People v Ayers*, 213 Mich App 708, 723; 540 NW2d 791 (1995). Rather than fleeing after obtaining Herard's ring, defendant participated in a group attack on his fifteen-year-old victim that included hitting him with a board. This assault bore no relation to the physical force necessary to obtain the ring, and was inflicted for the sole purpose of harming Herard.

Next, defendant argues that the trial court erred in assessing ten points under offense variable nine. Again, we disagree. Ten points should be assessed under the variable when the defendant was a leader in a multiple offender situation. Michigan Sentencing Guidelines, p 100 (2d ed 1988). The entire criminal episode should be taken into account in determining whether a defendant was a leader. *People v Gatewood*, 214 Mich App 211, 213; 542 NW2d 605 (1995). Upon review of the record, we find that evidence exists to support the trial court's determination that defendant was a leader, and, therefore, it did not err in assessing ten points under the variable. *Ayers, supra* at 723. Defendant was the only assailant who spoke to Herard, and defendant initiated the attack by hitting Herard and taking his ring.

Finally, defendant contends that the trial court abused its discretion in sentencing him to a term that violates the principle of proportionality. Defendant's sentence was within the guidelines range of thirty-six to eighty months and is therefore presumptively proportionate. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 47 (1994). Upon review of the offense and the offender, we conclude that defendant has failed to demonstrate the existence of unusual circumstances necessary to rebut this presumption. *People v Piotrowski*, 211 Mich App 527, 532; 536 NW2d 293 (1995). Neither defendant's lack of a prior adult criminal record nor his youth are sufficient to rebut the presumption of proportionality. *Id.* at 532-533. Accordingly, we find that the trial court did not abuse its discretion in sentencing defendant. *People v Odendahl*, 200 Mich App 539, 541; 505 NW2d 16 (1993).

Affirmed.

/s/ Peter D. O'Connell

/s/ David H. Sawyer

/s/ George R. Corsiglia